

Federal Communications Commission

DA 05-2495

SEP 27 9 17 PM '05

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-270
Table of Allotments,)	RM-11268
FM Broadcast Stations.)	RM-11272
(Aguila, Apache Junction, Buckeye, Glendale,)	
Peoria, Wenden, and Wickenburg, Arizona))	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 2005

Released: September 26, 2005

Comment Date: November 17, 2005

Reply Comment Date: December 2, 2005

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Rule Making filed by Entravision Holdings, LLC, ("Petitioner"), licensee of Station KVVA-FM, Channel 296C3, Apache Junction, Arizona; FM Station KDVA, Channel 295A, Buckeye, Arizona; and FM Station KLNZ, Channel 278C, Glendale, Arizona. Petitioner proposes the upgrade of Channel 296C3 to Channel 296C1, reallocation of Channel 296C1 from Apache Junction to Peoria, Arizona, and modification of the Station KVVA-FM license accordingly. In order to accommodate this upgrade and reallocation, Petitioner proposes to substitute Channel 229C3 for vacant Channel 297C3 at Aguila, Arizona. In order to retain local service at Apache Junction, the licensee of AM Station KCKY, Coolidge, Arizona, filed an application to change its community of license to Apache Junction before the Petitioner filed the instant proposal and that application has been granted. In addition, in order to accommodate the reallocation of Channel 296C1 to Peoria, Petitioner requests that Channel 295A at Buckeye be upgraded to Channel 295C3, that Channel 295C3 be reallocated from Buckeye to Wenden, Arizona, and the Station KDVA license be modified accordingly. In order to maintain local service at Buckeye, Petitioner proposes to reallocate Channel 278C from Glendale, Arizona to Buckeye, Arizona, and modify the Station KLNZ license accordingly. If the petition before us is granted, Petitioner will file applications for Channel 296C1 at Peoria, Channel 295C3 at Wenden, and Channel 278C at Buckeye. Black Entrepreneur Association, Inc. ("BEA") has filed a petition for rule making to allot Channel 229C3 at Wickenburg, Arizona, as that community's fifth local service. BEA's petition is mutually exclusive with Petitioner's proposal to substitute Channel 229C3 for vacant Channel 297C3 at Aguila, Arizona. Therefore, we will consider BEA's proposal in the context of this proceeding.

2. Petitioner invokes the provisions of Section 1.420(i) of the Commission's rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.¹ The proposed new communities

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

of license for Stations KVVA-FM, KDVA, and KLNZ are mutually exclusive with those stations' existing authorizations, as required by Section 1.420(i) of the Commission's rules.

3. Petitioner states that the reallocation of Channel 296C1 from Apache Junction to Peoria would not deprive Apache Junction of its sole local transmission outlet, because Apache Junction would be served by AM Station KCKY.² Further, the reallocation of Channel 295C3 from Buckeye to Wenden would not deprive Buckeye of its sole local transmission outlet because Buckeye would be served by Channel 278C, Station KLNZ. Petitioner notes that the Commission's FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*³ would be served because Petitioner would provide a first local service at Peoria and Wenden, Arizona. Further our engineering staff finds that the Wenden proposal would provide a first aural reception service to an uninhabited area of 94 square kilometers, and a second aural reception service to an area of 1,209 square kilometers containing 1,735 persons. Because Petitioner's proposal is consistent with the provisions of Section 1.420(i) of the Commission's rules, we shall propose to modify the authorization of Stations KVVA-FM, KDVA, and KLNZ without entertaining competing expressions of interest in the use of Channel 296C1 at Peoria, Channel 295C3 at Wenden, and Channel 278C at Buckeye, Arizona, or requiring Petitioner to demonstrate the availability of an additional equivalent channel for use by other parties.

4. Since Peoria is part of the Phoenix-Mesa, Arizona Urbanized area and since the allotment of 296C1 to Peoria as a first local service would result in Station KVVA-FM's 70 dBu contour covering 96.7 percent of the Phoenix-Mesa, Arizona Urbanized area and 100 percent of the Avondale, Arizona Urbanized Area, Petitioner must submit a showing pursuant to *Faye and Richard Tuck*⁴ to demonstrate that Peoria is independent of the two foregoing urbanized areas and therefore is entitled to consideration as providing a first local service to Peoria. Petitioner has already submitted a *Tuck* showing concerning Peoria's independence of the Phoenix-Mesa Urbanized Area. A *Tuck* showing demonstrating Peoria's independence of the Avondale, Arizona Urbanized Area must also be submitted.

5. Consistent with the technical requirements of the Commission's rules, Channel 296C1 can be allotted to Peoria, Arizona, utilizing coordinates of 33-35-47 NL and 112-05-31 WL, with a site restriction of 13.5 kilometers (8.4 miles) east of Peoria. Consistent with the technical requirements of the Commission Rules, Channel 229C3 can be allotted to Aguila, Arizona, utilizing coordinates of 33-56-34

² Prior to the filing of the Petition for Rule Making in this proceeding on March 23, 2004, the licensee of AM Station KCKY, Coolidge, Arizona, had filed an application to change its community of license to Apache Junction, Arizona, (File No. BMJP-20040128AKH). That application was granted on August 15, 2005. At the time the Petition for Rule Making was filed, it was contingent upon grant of the AM application and we deferred issuance of this *Notice of Proposed Rule Making* until grant of the application. This is not conducive to the efficient processing of petitions for rule making. In the future, any petition for rule making which specifies an ungranted construction permit application as a "backfill" to replace the prospective loss of a sole local service will be returned. The petition for rule making may be refiled once the construction permit application has been granted.

³ 90 FCC 2d 88 (1982). The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters. Equal weight is given to priorities (2) and (3).

⁴ *Faye and Richard Tuck*, 3 FCC 5374 (1988) ("*Tuck*"); see also *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995) (a reallocation proposal providing a first local service must submit a showing pursuant to *Tuck* when the proposed 70 dBu contour will encompass more than 50 percent of an Urbanized Area).

NL and 113-10-24 WL. In addition, in compliance with the Commission's technical rules, Channel 295C3 can be allotted to Wenden, Arizona, at coordinates of 33-49-06 NL and 113-37-46 WL, with a site restriction of 8.2 kilometers (5.1 miles) west of Wenden. In compliance with the Commission's technical rules, Channel 278C can be allotted to Buckeye, Arizona, at coordinates of 33-35-33 NL and 112-34-49 WL, with a site restriction of 24.7 kilometers (15.3 miles) north of Buckeye. Lastly, in the event that BEA's proposal for Channel 229C3 at Wickenburg is preferred over Petitioner's proposal, Channel 229C3 can be allotted to Wickenburg at coordinates of 33-53-49 NL and 112-54-45 WL, with a site restriction of 18.7 kilometers (11.6 miles) southwest of Wickenburg, Arizona. Since all of the foregoing proposed allotments are within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission has sought concurrence on these allotments with the Mexican Government.

6. Given the two mutually exclusive proposals of Petitioner and BEA, we must compare Petitioner's proposal to provide first local aural transmission service to Peoria and Wenden, Arizona and to provide first and second aural reception service to some areas surrounding Wenden, with BEA's proposal to provide a fifth local aural transmission service to Wickenburg, Arizona. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel Nos.</u>	
	<u>Present</u>	<u>Proposed</u>
	<u>Option I</u>	
Aguila, Arizona	297C3	229C3
Apache Junction, Arizona	296C3	-----
Buckeye, Arizona	295A	278C
Glendale, Arizona	222C, 278C	222C
Peoria, Arizona	-----	296C1
Wenden, Arizona	-----	295C3
<u>Option II</u>		
Wickenburg, Arizona	242C, 287C2	229C3, 242C, 287C2

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Pursuant to 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or

before November 17, 2005, and reply comments on or before December 2, 2005, and are advised to read the *Annex* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Petitioner's counsel, as follows:

Barry A. Friedman, Esq.
Thompson Hine L.L.P.
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

Mark N Lipp, Esq.
Scott Woodworth, Esq.
Vinson & Elkins, L.L.P.
1455 Pennsylvania Ave., N.W.
Suite 600
Washington, D.C. 20004

9. Parties must file an original and four paper copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. **All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁵ This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

11. For further information concerning this proceeding, contact R. Barthen Gorman, Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

⁵ See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW, Washington, D.C.